83-1548

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

FRANK KUSTINA, Appellant,

v.

THE CITY OF SEATTLE, and THE HISTORIC SEATTLE PRESERVATION and DEVELOPMENT AUTHORITY, Appellees.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT
(See page A-1 of PETITION for listing of Opinions of the Courts Below)

Frank Kustina
5201 Ballard Ave N. W.
Seattle, Wa 98107
206-789-2155
Appellant Pro se

APPENDIX

I. Opinions of the Courts Below
   - A. King Cy Superior Court dtd June 14, 1978
   - B. Court of Appeals of the State of Wa dtd Apr 9, 1979
   - C. Fed Dist Ct Order dtd Aug 11, 1980
   - D. Fed Dist Ct Order dtd June 10, 1981
   - E. Fed Dist Ct Order dtd Dec 10, 1981
   - F. Fed Dist Ct Order dtd Oct 1, 1982
   - G. Fed Dist Ct Order dtd Nov 24, 1982
   - H. 9th Cir Fed Ct of Appeals Order dtd Dec 14, 1983
   - I. 9th Cir Fed Ct of Appeals Order dtd Feb 2, 1984

II. Other Appended Materials
   - A. State Complaint
   - B. Federal Complaint
   - C. Brief of Appellant before the Wa State Appeals Court due to the cost of reproduction 1 copy is provided the Clerk and attached to original appendix only
   - D. Civil Docket Entry #19 Motion for Relief from Order
   - E. Civil Docket Entry #7 Exhibit A att'd to Affidavit of John Turnbull—MINUTES of Sept 14th meeting
   - F. Seattle Ordinance 105462
   - G. Wa AGO 1971 No. 33 page 31
   - H. ByLaws and Procedures for the Ballard Avenue Landmarks Board
   - I. Washington Practice Rules for Superior Court CR8(a) and sec. 5101
   - J. Washington Practice Rules for Superior Court CR 56
   - K. 16A C.J.S. 422, 428
   - L. 16 U.S.C. 470 Nat'l Historic Preservation Act
   - M. 28 U.S.C. 1254
   - N. 28 U.S.C. 1343
   - O. 28 U.S.C sections 1911, 1913, & 1914
   - P. 42 U.S.C. 1985(3)
   - Q. Constitution of Washington Art. 1, sections 2,3,4, & 32

APPELLANT DOES NOT HAVE FUNDS TO COMMERCIALLY PRINT THE APPENDIX ITEMS. THEY CAN BE PROVIDED ON 8½ x 11 PAPER AT NO ADDITIONAL COST.

IN QUESTION IS THE COST TO SPEAK UNDER THE FIRST AMENDMENT.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

FRANK KUSTINA,

Plaintiff,

vs.

HISTORIC SEATTLE PRESERVATION AND DEVELOPMENT AUTHORITY, a public corporation; THE CITY OF SEATTLE, a municipal corporation; PAUL SCHELL, JAMES HORNELL, ALFRED PETTY, each a former or present municipal official; GEORGE E. BENSON, TIM HILL, PAUL KRAABEL, PHYLLIS LAMPHERE, WAYNE D. LARKIN, JOHN R. MILLER, RANDY REVELLE, SAM SMITH, JEANETTE WILLIAMS, each a former or present municipal official; WES UHLMAN, a municipal official,

Defendants.

NO. 833 228

JUDGMENT OF DISMISSAL UNDER CR 12(b) and CR 56(b)

This matter having come on regularly for hearing before the undersigned Judge of the above-entitled court upon the motions of defendants for judgment dismissing plaintiff's complaint with prejudice pursuant to Cr 12(b) and CR 56(b); the court having reviewed

the pleadings, motions, affidavits, memoranda and other documents on file herein and having heard argument from counsel and from plaintiff, and it appearing to the court that plaintiff's complaint fails to set forth any claim upon which relief could be granted, that there is no genuine issue of material fact and that defendants' motions should be granted for the reason that plaintiff's action was brought beyond the 20 day time required by law, and is at any rate barred by principles of estoppel and laches, for the reason that plaintiff has not alleged, identified or sustained any legal injury, is not aggrieved and lacks standing, and for the reason that the uncontroverted affidavits on file herein establish that plaintiff's claims predicated upon Seattle Ordinance 105462 are without merit

as a matter of law and are at any rate moot; Now, Therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's complaint is dismissed with prejudice and with costs to defendants.

DONE IN OPEN COURT this 14th (handwritten) day of June, 1978.

/s/ Jack Scholfield
JUDGE

Presented by:

/s/ Charles D. Brown
CHARLES D. BROWN
Of counsel for Defendants
Except Historic Seattle
Preservation & Development Authority

APPROVED FOR ENTRY

/s/ John J. Dystel
JOHN J. DYSTEL
Attorney for Historic Seattle Preservation and Development Authority

APPROVED AS TO FORM, NOTICE OF PRESENTATION WAIVED:

/s/ Frank Kustina
FRANK KUSTINA, Plaintiff

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FRANK KUSTINA,

Appellant,

v.

HISTORIC SEATTLE PRESERVATION AND DEVELOPMENT AUTHORITY, a public corporation; THE CITY OF SEATTLE, a municipal corporation; PAUL SCHELL, JAMES HORNELL, ALFRED PETTY, each a former or present municipal official; GEORGE E. BENSON, TIM HILL, PAUL KRAABEL, PHYLLIS LAMPHERE, WAYNE D. LARKIN, JOHN R. MILLER, RANDY REVELLE, SAM SMITH, JEANETTE WILLIAMS, each a former or present municipal official; WES UHLMAN, a municipal official,

Respondents.

NO. 6698-I

DIVISION ONE Filed: Apr 9, 1979

DORE, FRED, J. --Plaintiff alleged that he was the owner of property in Ballard, and he brought this action against the Ballard Avenue Landmark District demanding the removal of two small historic residential houses that Historic Seattle Preservation and Development Authority(Historic Seattle) had acquired, renovated and moved to

their present location in Ballard. Along with Historic Seattle, plaintiff's complaint named as defendants the City of Seattle, the former director of Seattle's Department of Community Development, the acting director of that department, the Superintendent of Buildings for the City of Seattle, all members of the Seattle City Council, and Seattle's former mayor. The court granted the defendants' motion for summary judgment of dismissal. Plaintiff appeals.

ISSUES

1. Did the trial court err in holding that plaintiff had no standing to challenge the administrative actions of Historic Seattle Preservation and Development Authority?

2. Did the court err in holding that plaintiff's petition for writ of

certiorari was untimely?

3. Did the trial court err in holding that plaintiff's complaint coupled with the uncontroverted affidavits before the court, failed to set forth a viable claim upon which relief could be granted?

STATEMENT OF FACTS

Historic Seattle is a public authority chartered by the City of Seattle, pursuant to RCW 35.21.725 and Seattle Ordinance 103387. Historic Seattle's charter states that the public authority's purpose is to preserve and enhance the historic heritage of the City of Seattle for the mutual pride and enjoyment of Seattle's citizens and for the creation of a more livable environment within the historic areas of the city.

On October 15, 1976, the Ballard

Avenue Landmark District (Seattle Ordinance 105462) was created to preserve, protect, enhance, and perpetuate those elements of the district's cultural, social, economic, architectural, historic or other heritage. The ordinance prohibited certain changes in the buildings, structures and other visible property therein without a certificate of approval. The ordinance further established a board consisting of 5-7 members to be elected, which would administer and enforce the ordinance. Upon application for a certificate of approval, the ordinance provided that the board act to review the application and grant or deny the same within 30 days. If the board failed to act within the 30-day limit, the application would be deemed approved and the director of the Department of

Community Development would thereafter issue a certificate of approval.

In May of 1976, Historic Seattle acquired two of Seattle's oldest residential houses, the "Pioneer Houses." The Pioneer Houses were in danger of being demolished as the result of commercial development in Seattle's International District, and Historic Seattle acquired the houses for the purpose of relocating and renovating them in order to preserve an important part of Seattle's heritage.

Earl Layman of Historic Seattle stated in his affidavit in reference to the two Pioneer Houses as follows:

> The (pioneer) houses are among the oldest structures still existing in the city. Modest single-family structures of this type once existed in considerable numbers along Ballard Avenue in what is now the Landmark District . . .(The pioneer houses) preserve and enhance

> the District's cultural, historic and architectural heritage by providing a unique example of a type of structure that once was common on Ballard Avenue.

Historic Seattle thereafter sought to relocate the houses to the Ballard Avenue Landmark District, created in April of 1976, pursuant to Seattle City Ordinance 105462. On May 26, 1976, pursuant to Ordinance 105462, Historic Seattle applied for a certificate of approval of Historic Seattle's proposal to relocate the Pioneer Houses to the Ballard Avenue Landmark District. At that time the Ballard Avenue Landmark District Board created by Ordinance 105462 had not yet been elected. That board's members were not elected until July of 1976.

Section 5(d) of Ordinance 105462 requires that the director of Seattle's Department of Community Development

unilaterally act upon an application for a certificate of approval if the Ballard Avenue Landmark District Board does not act upon that application within 30 days from the date the application is submitted. Because the Ballard Avenue Landmark District Board did not act, and could not have acted, upon Historic Seattle's application for a certificate of approval within 30 days from Historic Seattle's submission of that application, the director of Seattle's Department of Community Development, acting under the requirements of the ordinance, issued Historic Seattle a certificate of approval on June 3, 1976. In August of 1976, the City of Seattle issued a building permit to Historic Seattle pursuant to Historic Seattle's July 21, 1976 application for such a building permit to allow the

relocation of the Pioneer Houses to the Ballard Avenue Landmark District. Historic Seattle moved the Pioneer Houses to the Ballard Avenue Landmark District on September 27, 1976.

Although Historic Seattle's plan to relocate the Pioneer Houses had been amply publicized in various Ballard publications prior to September 27, 1976, and even though the plaintiff was well aware of the relocation plans well before the relocation of the Pioneer Houses, he took no action whatsoever to contest Historic Seattle's relocation of the houses until August of 1977, almost one year after the Pioneer Houses had actually been relocated in Ballard. As soon as the Ballard Avenue Landmark District Board had elected and appointed the various members of their board, the composition of which was completed after

Historic Seattle had received its building permit to relocate the Pioneer Houses, the board endorsed the relocation of the houses before they were actually moved to their present Ballard site.

Plaintiff admits that he learned of Historic Seattle's plan to relocate the Pioneer Houses to the Ballard Avenue Landmark District on June 14, 1976, and he also attended a public hearing on such proposal on July 27, 1976, which hearing was held to afford Ballard residents an opportunity to comment upon Historic Seattle's plan to relocate the Pioneer Houses.

DECISION

ISSUE 1: Plaintiff lacked standing to bring this action.

Since Ordinance 105462 does not authorize appellant's present action, such action is necessarily one pursuant

to RCW 7.16.040 for a writ of certiorari to review both the issuance of a certificate of approval by the director of Seattle's Department of Community Development and the issuance of a building permit by Seattle's Superintendent of Buildings.

However, an action for a writ of certiorari may only be maintained by one claiming to be "aggrieved" by administrative or judicial action. Jones v. Jones, 68 Wn. 2d 413, 415, 413 P2d 338 (1966). The courts have consistently held that in order to be "aggrieved" for purposes of standing to challenge administrative actions, a plaintiff "must allege and prove that he has suffered some special damages not common to other property owners similarly situated." See Unger v. Forest Homes T.P., 237 N.W. 2d 582, 584 (Mich. App. 1975), where the

court held that plaintiff lacked standing to challenge an amendment to a municipality's zoning ordinance because the plaintiff had failed to establish that he had "suffered a special damage by reason of the change in the use or zoning--different from that suffered by the general public." See also Whitney Theater Co. v. Zoning Board of Appeals, 189 A. 2d 396, 399 (Conn. 1963), where the court held that a plaintiff in an action to review the decision of a municipal zoning board "had the burden of proving that it was aggrieved" which "required the plaintiff to establish that it was specially and injuriously affected in its property rights or other legal rights."

In the present case, appellant has alleged no such special damage resulting to him from Seattle's actions that

permitted Historic Seattle to relocate the Pioneer Houses from Seattle's International District to Ballard. Appellant has alleged only that he is the owner of property in Ballard, and such an allegation is insufficient to afford appellant standing.

Consequently the lower court properly held that plaintiff had no standing to challenge the certificate of approval and building permit issued to Historic Seattle for the relocation of the Pioneer Houses.

ISSUE 2: Appeal untimely.

The trial court's ruling must be affirmed for the additional reason that the plaintiff's appeal was not timely. Petitions for writs of certiorari to review administrative actions must be filed within 20 days from the contested administrative action just as appeals to

Superior Court from decisions of courts of limited jurisdiction must be filed within 20 days.

In the present case, no statute or ordinance gave appellant the right to challenge the administrative actions at issue here. Appellant's complaint is necessarily one seeking a writ of certiorari to review administrative actions. Because appellant's complaint was brought one year from the administrative actions of which he complains, and not within 20 days, the lower court properly dismissed that complaint pursuant to Vance v. Seattle, 18 Wn. App. 418, 569 P. 2d 1194 (1977). Moreover, even if Ordinance 105462 had authorized appellant's appeal, which it does not, that ordinance requires that such appeals be taken within 20 days. Thus, whether appellant's action is one for a writ of

certiorari or one taken pursuant to Seattle City Ordinance 105462, the lower court properly ruled that appellant's action was time-barred.

ISSUE 3: Plaintiff's cause of action moot.

Even assuming the validity of plaintiff's claim, such claims are entirely moot. It is undisputed that once the board's elections were held and the board became operational, and reviewed the project in question, they unanimously endorsed it and approved the issuance of the certificate of approval. Such ratification cured any defect in the prior decision. Owings v. Olympia, 88 Wash. 289, 152 P. 1019(1915).

Affirmed.

/s/ Dore, Fred

WE CONCUR:

/s/ Farris, J.

/s/ Swanson, H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

FRANK KUSTINA,
Plaintiff,
vs.

THE CITY OF SEATTLE and THE HISTORIC SEATTLE PRESERVATION BOARD AND DEVELOPMENT AUTHORITY,
Defendants.

No. C80-529V

ORDER ON MOTION TO DISMISS

Having considered the motion of defendants to dismiss, together with the memoranda and affidavits submitted by counsel, the Court now finds and rules as follows:

1. Although styled a motion to dismiss for failure to state a claim upon which relief can be granted, defendants' motion is actually one for summary judgment of dismissal. Both parties have treated the motion as one for summary judgment by submitting affidavits and documents outside the

record in support of their positions. The Court will therefore treat the motion as being one for summary judgment.

2. With respect to plaintiff's first eleven causes of action, it is clear that prior state court proceedings bar the assertion of those claims in this Court. Title 28 U.S.C. 1738; Scoggin v. Schrunk, 522 F. 2d 436 (9th Cir. 1975), cert. denied, 423 U.S. 1066 (1976); Dennun v. Board of Governors, 413 F. Supp. 1274 (D.N.J. 1976); Seattle-First National Bank v. Kawachi, 91 Wn. 2d 223, 588 P. 2d 725(1978). Society has a substantial interest in the finality of litigation. Once a matter has been litigated, it is wasteful of both public and private resources to re-litigate the same matter. If plaintiff desired to have a federal court rule on his claims, he should have

sought certiorari before the United States Supreme Court. In any event, the Court has reviewed the prior rulings of the state courts and is in agreement with those rulings.

3. None of the remaining claims implicate the Historic Seattle Preservation and Development Authority in any way. To the extent that those claims attempt to impose liability upon the Authority, they do not state a claim upon which relief can be granted.

Accordingly, the motion of defendants is GRANTED in part and DENIED in part. The Historic Seattle Preservation Board and Development Authority is dismissed as a party defendant. The first eleven claims against defendant City of Seattle are DISMISSED WITH PREJUDICE.

The Clerk of this Court is

instructed to send uncertified copies of this order to all counsel of record.

The Clerk shall prepare a judgment of dismissal with prejudice with respect to defendant Authority.

DATED this 11th (handwritten) day of August, 1980.

/s/ Donald S. Voorhees
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

FRANK KUSTINA,
Plaintiff,
vs.

THE CITY OF SEATTLE; and THE HISTORIC SEATTLE PRESERVATION BOARD AND DEVELOPMENT AUTHORITY,
Defendants.

No. C80-529V

ORDER

Having considered plaintiff's motion to vacate and set aside this Court's order of August 11, 1980, together with the memoranda and affidavits filed by counsel, the Court finds that good cause has not been shown as to why that order should be vacated and set aside.

Accordingly, plaintiff's motion is DENIED.

The Clerk of this Court is instructed to send uncertified copies of this order to the plaintiff and to all counsel of record.

DATED this 10 (handwritten) day of June, 1981.

/s/ Donald S. Voorhees
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRANK KUSTURA,
Plaintiff,
v.

THE CITY OF SEATTLE, and THE HISTORIC SEATTLE PRESERVATION BOARD AND DEVELOPMENT AUTHORITY,
Defendants.

No. C80-529C

ORDER

Having considered plaintiff's motion for reconsideration of the Court's denial of plaintiff's motion to vacate and set aside this Court's order of August 11, 1980, together with the memoranda filed by counsel, the Court finds and reaffirms that good cause has not been shown as to why that order should be vacated and set aside.

Accordingly, plaintiff's motion is DENIED.

The Clerk of this Court is

instructed to send uncertified copies of this order to the plaintiff and to all counsel of record.

DATED this 10 (handwritten) day of December, 1981.

/s/ Donald S. Voorhees
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRANK KUSTINA,
Plaintiff,
vs.

THE CITY OF SEATTLE,
Defendant.

NO. C80-5?9C

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THESE MATTERS come on for consideration on the motion of plaintiff Frank Kustina for reconsideration of the Court's earlier Orders dismissing his first twelve claims and on the motion of defendant City of Seattle for summary judgment. Oral argument was not requested by either party. The Court now finds and rules as follows:

1. Plaintiff's motion for reconsideration is DENIED. The Court further notes that after considering the

facts in the light most favorable to the plaintiff, his twelfth claim does not state a claim under 42 U.S.C. 1983.

2. Defendant's motion for summary judgment is GRANTED. RCW 70.93 et seq. does not provide plaintiff with a right to sue the City of Seattle for having an insufficient number of litter receptacles in the Ballard Avenue Landmark District. First, considering the legislative history of the Model Litter Control and Recycling Act, it is unlikely municipalities were intended to be sued under the statute. Second, since the City is not the property owner within the relevant area, it has not offended the statute even if it is applicable. Finally, even if the statute was violated, the duty was not one owed to the plaintiff so as to warrant suit. See Baerlein v. State of Washington,

92 Wn 2d 229 (1979).

3. Plaintiff's fourteenth claim is similarly without support. Considering the precatory language of the Adams Neighborhood Improvement Plan and the total lack of any facts to support a conclusion that the City acted arbitrarily and capriciously in not encouraging parking on City rights-of-way, defendant is entitled to judgment. See Barrie v. Kitsap County, 93 Wn 2d 843 (1980).

4. Claim fifteen must be dismissed for two reasons: First, to the extent it seeks to challenge the City's alleged noncompliance with Ordinance 105462, it is res judicata. Second, to the extent plaintiff claims that his own certificate of approval was improperly handled, plaintiff has failed to exhaust the

administrative remedies created by the ordinance. No evidence has been provided which would warrant an exception to the exhaustion requirement.

For the above stated reasons, plaintiff's motion for reconsideration is DENIED and defendant's motion for summary judgment is GRANTED.

The Clerk of this Court is instructed to enter Judgment accordingly and to send uncertified copies of this Order and of the Judgment to plaintiff, appearing pro se herein, and to counsel for the defendant.

DATED this 1st (handwritten) day of October, 1982.

/s/ John C. Coughenour
John C. Coughenour
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRANK KUSTINA, Plaintiff, NO. C80-529C

vs. ORDER

THE CITY OF SEATTLE, Defendant.

THESE MATTERS come on for consideration on the motions of plaintiff Frank Kustina for leave to amend his complaint and add additional parties and for reconsideration of the Court's Order denying his motion for reconsideration and granting defendant's motion for summary judgment. The Court cannot consider these motions. On October 26, 1982, plaintiff filed his notice of appeal. Once a notice of appeal is filed, jurisdiction is vested in the Court of Appeals, and the District Court has no power to modify its judgments. See Matter of Visioneering Construction, 661 F. 2d 119, 124 n.6

(9th Cir. 1981); Petrol Stops Northwest v. Continental Oil Co., 647 F.2d 1005, 1010 (9th Cir. 1981).

The motions are therefore STRICKEN as the Court is without power to consider them.

The Clerk of this Court is instructed to send uncertified copies of this Order to plaintiff, appearing pro se herein, and to counsel for the defendant.

DATED this 24th(handwritten) day of November, 1982.

/s/John C. Coughenour
John C. Coughenour
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed Dec 14, 1983

FRANK KUSTINA,
Plaintiff-Appellant,

vs.

CITY OF SEATTLE,
Defendant-Appellee.

No. 82-3603

D.C. No. CV 80-519JCT

MEMORANDUM

*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit.

Appeal for the United States District Court for the Western District of Washington (Seattle) Honorable John C. Coughenour, Presiding

Argued and Submitted November 9, 1983

Before: SNEED, NELSON, and REINHARDT, Circuit Judges

Plaintiff Frank Kustina filed an action against the City of Seattle under

42 U.S.C. 1983 (Supp. V 1981) and under Washington state law. The district court held that the doctrine of res judicata precluded litigation of twelve of the fifteen claims. In addition, the district court dismissed another cause of action for failure to state a claim upon which relief can be granted and granted summary judgment for the City of Seattle on the merits of two state law claims. We affirm in part and reverse in part.

RES JUDICATA

When a section 1983 action is based on the same wrong that was the subject of a state court action between the same parties and the preclusion rules of the state in question would bar litigation of those issues the doctrine of res judicata precludes a federal court from deciding whether

other legal theories would allow for recovery. See Allen v. McCurry, 449 U.S. 90, 96 (1980); Heath v. Cleary, 708 F. 2d 1376, 1379 (9th Cir. 1983); Migdal v. Superior Court, 703 F. 2d 332, 336 (9th Cir. 1983); Scoggin v. Schrunk, 522 F. 2d 436, 437 (9th Cir.), cert. denied, 423 U.S. 1066 (1976); see also 28 U.S.C. 1738 (1976) (requiring federal courts to give full faith and credit to state court judgments). In short,

> where the federal constitutional claim is based on the same asserted wrong as was the subject of the state action, and where the parties are the same, res judicata will bar the federal constitutional claim whether it was asserted in state court or not, for the reason that the state judgment on the merits serves not only to bar every claim that was raised in the state court but also to preclude the assertion of every legal theory or ground for recovery that might have been raised in support of the granting of the desired relief.

Scoggin, 522 F. 2d at 437 (emphasis added). 1/

Under Washington law, all possible challenges to a common nucleus of operative facts are treated as if they had been decided in a final judgment whether or not the theories actually were raised in the proceedings. See Seattle-First National Bank v. Kawachi, 91 Wash. 2d 223, 226-28, 588 P. 2d 725, 728 (1978); Sanwick v. Puget Sound Title Insurance Co., 70 Wash. 2d 438, 441-42, 423 P. 2d 624, 627 (1967). Here, the plaintiff originally brought an action against the City of Seattle in state court challenging the placement of two houses in a district zoned for landmarks and the Seattle ordinance creating that district, on federal and state law grounds. Claims one through eleven and fifteen of the complaint

filed in federal court challenge the same conduct of the same defendant and the same ordinance. Therefore, even if the state court "judgment may have been wrong or rested on a legal principle subsequently overruled in another case," the doctrine of res judicata bars litigation of these issues once again. Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981) (citations omitted).2/ We therefore affirm the district court's holding that that the doctrine of res judicata precludes litigation of claims one through eleven and fifteen.

FAILURE TO STATE A CLAIM

The plaintiff's twelfth claim is that the improper use of public funds jeopardized the future receipt of federal funds within the landmark district and violated state and federal law. The

speculative allegation indicates only a general concern shared by other property owners within the district, rather than any threatened or actual individual injury. Because a generalized grievance brought by a taxpayer and shared by a large class of citizens does not alone warrant the exercise of federal jurisdiction, and because the plaintiff failed to plead any individual injury, the assertion of federal jurisdiction over the twelfth claim would have been improper. See Warth v. Seldin, 422 U.S. 490, 499 (1975). To the extent that the twelfth claim raised state law issues, those parts of the claim should have been dismissed without prejudice after dismissal of the federal claims. See pp. ___ infra. Accordingly, we hold that the district court properly dismissed the claim.

STATE LAW CLAIMS

The district court exercised pendent jurisdiction over the state issues raised in claims thirteen and fourteen. In cases in which a federal court exercises pendent jurisdiction over state claims, "if the federal claims are dismissed before trial . . . the state claims should be dismissed as well." United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (emphasis added). Here, the district court, rather than granting summary judgment on the merits, should have dismissed without prejudice the complex state law claims after the federal claims were dismissed. See Brandwein v. California Board of Osteopathic Examiners, 708 F. 2d 1466, 1475 (9th Cir. 1983) (citing United Mine Workers v. Gibbs);

Townsend v. Columbia Operations, 667 F. 2d 844, 850 (9th Cir. 1982). We therefore reverse the district court's summary judgment on the state law issues raised in claims thirteen and fourteen and remand the case with instructions to dismiss the claims without prejudice.

AFFIRMED IN PART, REVERSED IN PART

FOOTNOTES

1/ In deciding whether the doctrine of res judicata precludes litigation of a claim, a federal court generally would consider

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Harris v. Jacobs, 621 F. 2d 341, 343 (9th Cir. 1980) (citation omitted); see Rutledge v. Arizona Board of Regents, 660 F. 2d 1345, 1351 (9th Cir. 1981); Gallegher v. Frye, 631 F. 2d 127,128-29 (9th Cir. 1980).

2/ The plaintiff alleges that res judicata should not bar litigation of his claims because the defendants perpetrated fraud upon the state courts. We previously have reserved the question whether there is a fraud exception to the doctrine of res judicata. See Costantini v. Trans World Airlines, 681 F. 2d 1199, 1202 (9th Cir.), cert. denied, 103 S. Ct. 570 (1982). However, we have emphasized that, even if such an exception exists, a party must allege fraud with particularity. 681 F. 2d at 1202-03. We hold that the plaintiff's conclusory allegations of fraud are insufficient to fall within a proposed exception to the doctrine of res judicata.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK KUSTINA,
Plaintiff-Appellant,

vs.

Filed Feb 2, 1984

CITY OF SEATTLE,
Defendant-Appellee.

NO. 82-3603

Western District of Washington
(Seattle)

ORDER

Before: SNEED, NELSON, and REINHARDT,
Circuit Judges

Plaintiff's motion to file a late petition for rehearing with suggestion for rehearing en banc is granted.

The panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a

vote on the suggestion. Fred. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.